

United States
Court of Appeals
For the Ninth Circuit

A. F. LEVY, Administrator,	} <i>Appellant,</i>	
vs.		
JOHN E. SISSON and DORIS FISCHER,		} <i>Appellees.</i>

Appellant's Opening Brief

Appeal from the United States District Court for the
Southern District of California
Central Division.

A. F. LEVY,
4314½ Sunset Blvd.
Los Angeles 27, California,
In Propria Persona.

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A. F. LEVY, Administrator,	} No. 13058
JOHN E. SISSON and DORIS FISCHER,	

vs.
Appellant,
Appellees.

Appellant's Opening Brief

Appeal from the United States District Court for the
Southern District of California
Central Division.

STATEMENT OF FACTS

The verified complaint (p. 3, Ptd. record) states issuable facts tending to establish a cause of action against each and both of the defendants, in the completion of a conspiracy and concert of action to interfere and defeat the due course of justice of judgment creditors et al. represented by the plaintiff administrator therein. In violation of 571-1023-956-730-950 Cal. Probate Code and others too numerous to mention.

In pursuance of said facts which are comparably set forth in Title 8, Sec. 47, subdivision (2) U. S. C. A. together with the liability imposed thereunder of the following section 48 of the said title: Original jurisdiction is imposed upon the District Court under subdivisions one and two of Title 28, Sec. 1343. Review herein is authorized by T. 28-1291.

STATEMENT OF THE CASE

Debased persons deprived the decedent while living, of every right afforded under the Constitution and California laws. Though every effort to claim and retain them were exerted and no method of escape could be found after appeal to the courts fell upon deaf ears; the only relief of self destruction had to be taken by the deceased, who in her will disinherited these persons. They claimed the testatrix was incompetent to dispose by will of the remaining property which by futile effort to misappropriate before, had failed. They looted and devastated nearly all of this remaining property before the question of incompetency could be adjudicated, except the final payment due the deceased as an heir of another estate of which the defendants and appellees are or were representatives and attorneys. And this is the subject of the instant action and appeal.

Fearful that the respondents might join these other conspirators, because these conspirators had prematurely closed the ravaged estate, having filed assign-

ments, in their favor, supposed to be due from pretended heirs of the estate the appellant represents—extraordinary precautions were defeated by the appellees to advise the court of the requirements of 1023 supra requiring distribution to appellant and not to the heirs of the estate. (See Exhibit A, page 1, lines 25-26, also page 4, lines 9-10.) (Exhibit D, page 1, line 6, marked thus ***) (Note “All Items submitted” Exhibit D, page 2, does exclude objection of distribution to heirs.)

Thereafter when action for representatives’ right to distributive share was brought against respondents, so payment to judgment creditors would prevail against the respondents’ co-conspirators as provided by 1021-1023 Probate Code. Knowing full well that the decreed distribution to heirs could never become final the respondents instead of paying the decreed amount as shown by Exhibit B, page 6, to be \$375.98 or, if a lesser amount were claimed then to deposit said lesser amount with the court clerk as provided by law, they filed a demurrer to the complaint, (Exhibit E, page 1) holding that the statutory authority to sue aforesaid does not state facts sufficient to constitute a cause of action, falsely stating it was made in good faith.

While this demurrer was pending and after findings and conclusions were waived by the respondents and the final account settled as shown by four and five stars (thus ****) in Exhibit D, page 1, a mis-

named paper entitled "Petition for instructions," which is likewise shown on page one with six stars showing its denial by the Probate judge which had as its object to vacate the conclusions and settlement just stated, so the funds would be diverted to the respondents for extraordinary fees defeating their co-conspirators as well as the judgment creditors, because the respondents perpetrated a fraud upon the court in having the decree direct payment to the pretended heirs instead of through the regular course of probate administration.

Because of the malicious sustaining of the aforesaid demurrer, appellant sought to avoid this lower court by raising the monetary amount out of its jurisdiction, but again the respondents sought to thwart this through the court clerk insisting that the lower court's permission, which could not be obtained, must first be had. (See Exhibit B, pages 6-7.)

So anxious were the respondents that another malicious ruling might be had against the raised amended complaint which merely increased the monetary claim. On behalf of Doris Fischer a demurrer to the first amended complaint was prematurely filed when it was out of the court's jurisdiction to determine it. (See Exhibit E, page 3, so entitled.)

After needless delay the action was transferred to the higher trial court, and when no action was taken under the requirement of section 591 C. C. P. the instant action began in the U. S. District Court.

ARGUMENT

I.

The "Motion to dismiss and motion for judgment upon the pleadings" is found on pages 14 to 16 with a needless repetition following which is identical, except in respondent's name. Both will be treated as one. Eight requests for dismissal are shown. The first one that "complaint fails to state a claim upon which relief can be granted." They admit the facts stated in the complaint are true, so require no denial, by answer. The object of the complaint is to elicit an answer. To find out why these respondents and both of them, conspired with the conspirators of another estate to effect the payment of \$375.98 to the heirs of this other estate in which their co-conspirators would share and thereby defeat the judgment creditor claims pending against this other estate which the appellant herein represents. Why they obtained a decree of distribution, that ignores and leaves unsubmitted a warning and objection that a deceased heir's distributive share as provided by law aforesaid goes to the deceased heir's representative and not to the heirs of the deceased heir. Why before or after the appellant had begun suit as authorized by statute aforesaid against the appellee as defendant below the decreed distributive share of the deceased heir or no part thereof was tendered into court as required. (1025 C. C. P.) Where one bases an action upon statutory authority aforesaid, he states the greatest right to recovery the law can conceive.

(*San Francisco v. Spring Valley Water Co.*, 63 Cal. 528-9.) Then why did the appellees file repeated demurrers as set out in the statement of the case herein? Appellant relying upon the special statutory right to sue and having alleged and complied with all the conditions imposed by statute, the appellees seek to have it dismissed on the ground that it appears boldly from the face of the complaint that there is not the slightest grounds for recovery admitting that all the facts tending to state a cause of action against them is true.

It requires no citation of authority to say that before this court can sustain a lower court judgment order, the lower court must have jurisdiction of the subject matter, jurisdiction of the person or parties and must be based upon a sufficient complaint or other paper that institutes the action or proceeding. The omission of any one of these is a complete defense and fatal to the entire cause. Therefore if any one is lacking, it is not of the slightest consequence if any of the others, do or do not exist. Such fundamental questions are never waived and may be brought for the first time in the highest court in the land. So if objections to part of a claim are first made and not met then any time thereafter objection to the entire complaint is in order. Then, as in the remaining objections of the motion to dismiss, etc., objections to part of the complaint cannot be entertained where it is alleged that the entire complaint is insufficient and the court should compel the objector to go to trial upon the truly stated subject matter therein contained.

A mere inspection of the remaining seven objections, in addition attacks jurisdiction of the subject matter and parties in a manner that violates both Federal laws and rules of procedure and the fundamental rules of pleading, but for all practical purposes this is as well as though they had been well and properly pleaded since likewise they are matters that can not be considered if no claim for relief can be granted.

II.

When these matters came on for hearing, it became the duty of the trial judge to determine if the facts in the complaint were sufficient to invoke the court's jurisdiction or consideration as believed by the complainant as set out in paragraph III, page 4, printed record. He must do this without regard to the appellees' motion to dismiss, because if the facts stated in the complaint are insufficient to invoke the court's jurisdiction under the law relied upon in paragraph III aforesaid, there is nothing the opposing party might say that would do so. Every presumption on appeal is for the regularity of the proceedings below, so as we turn to the "Order Dismissing Action," page 19, printed record, we proceed to find on page 20, (1) That said complaint fails to state a claim, etc. Without reading further we know the court must have held that facts stated in complaint conferred and invoked the court's jurisdiction under the Constitution and Laws of the United States as set forth in said paragraph III of the complaint. However, as afore-

said—jurisdiction of the subject matter, is always open to this or any other court, for review and reversal if erroneous. Accordingly the court went into the merits of the “Motion to Dismiss” and if appeared certain that the appellees’ first objection “because the complaint fails to state a claim against the defendants upon which relief can be granted,” was correct. This being a complete defense as aforesaid, any further findings would constitute needless surplusage. But the court did not so find. As just stated it found instead: “That complaint fails to state a claim,” which must be reversed since a claim of \$5,412.16 is stated both in the opening and closing page of the complaint. (pp. 3-13 printed brief.) Having already determined that a right of action does exist under the amendment of the Constitution as stated in III of the complaint, it is of no consequence as stated in the closing sentence of (1) Court order, “that said action does not arise under any Article of Section of the Constitution of the United States.” The next finding or grounds (2) regarding parties, is likewise very true but it also is of no consequence since no such requirement is authorized or required in this particular action. The remaining matter in this court order is not proper and offers nothing for review and was, as shown, filed the same day as made without submitting it for approval as to form as required by rule 7 of the District Court for Central Division and referred to as “District Court Rules in the Notice of Appeal, page 21, printed record. Again defeating the regular course of law. (*People v. Gilbert*, 25 Cal. (2d) 422.)

III.

Not one relevant case or statute has been cited. In *Allen v. Corsano*, 56 Fed. Supp. 169-171, it says there has been a paucity of judicial interpretations on section 47. Though Allen's complaint was held not to be without color of law, it did not state a claim upon which relief could be granted because he failed to use the extraordinary remedy of mandamus, which is not available to your appellant because of the special statute aforesaid authorizing suit against the executrix and appellee herein.

In short then the only questions raised by this appeal is, (1) If the complaint does not state facts sufficient to constitute a *right* of action within the contemplation of the authority set forth in III of the complaint, then what facts are lacking? (2) Why the complaint fails to state a claim; it being admitted that the action does not arise under any Article or Section of the Constitution of the United States except that the judicial power extends "between a State, or the citizens thereof, and (3), why there must be a diversity of citizenship between the parties plaintiff and defendant before due process or regular course of law can prevail. The provisions of 1331-1332, Title 28, do not apply to Section 1343 herein.

Respectfully submitted,

A. F. LEVY,
In Propria Persona.

Dated at Los Angeles
October 31, 1951.

